HU LIONG KONG

v.

CELESTINE UJANG JILAN & ANOR

HIGH COURT BORNEO, KUCHING
GEORGE SEAH J
[ELECTION PETITION NO. K 3 OF 1979]
29 MARCH 1982

CIVIL PROCEDURE: *Review of taxation of bill of costs of items wholly disallowed by taxing master - Order 65 r. 27(29) Rules of the High Court in Borneo 1963 powers of receiving Court.*

This was an application by the 1st respondent, Celestine Ujang anak Jilan, under O. 59 r. 36 of the Rules of the High Court 1980 to review the taxation of a bill of costs dated 4 June 1981. The application was concerned solely with the sum of RM17,886 in out-of-pocket column under Item 154 being Skrine & Co.'s bill of charges which was wholly disallowed by the Ag. Deputy Registrar, who was the taxing master.

Held:

[1] As the election Judge had granted a certificate for 2 counsels for the 1st respondent and ordered the petitioner to pay to the 1st respondent the costs of the action to be taxed, the Ag. Deputy Registrar, as the taxing master, should have no difficulty in coming to the conclusion that it was necessary and proper for the 1st respondent to brief leading counsel in the person of Mr. Peter Mooney in defending the proceeding brought by the petitioner. O. 65, r. 27(29) of the Rules of the High Court in Borneo (1963) allows a very wide discretion to the taxing master, (*Pecheries Ostendaises v. Merchants Marine Insurance Co.* [1928] 1 KB 750 at 756) but under O. 59, r. 27 (29) the Registrar will only allow an item of costs if he is satisfied that such costs were "necessary" or "proper" for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.

[2] Since the 1st respondent's bill of costs was to be taxed on party and party basis under O. 59 r. 27(29) thereof and not as between solicitor and client, the Ag. Deputy Registrar was quite right in disallowing the RM17,886 claimed by the 1st respondent as bill of professional charges.

Where an order is made that the costs of the action are to be taxed, in the absence of anything to the contrary, it is assumed that the costs are to be taxed on party and party basis. Party and party costs are not complete indemnity (*Gundry v. Sainbury* [1910] 1 KB 645 at 649). Taxation as between party and party is an inquiry as to the costs which a party should recover from the opposite side. (*Goodwin v. Storrar* [1947] 1 KB 458)

[3] But as the election Judge had granted a certificate for 2 counsels and as the costs of leading counsel were necessary and proper for the attainment of justice or for defending the rights of the 1st respondent, the Ag. Deputy Registrar should have either (a) directed counsel for the 1st respondent to amend Item 154 by including (i) brief fee of leading counsel, (ii) his costs under Item 32(b)(i) of the scale of costs, appen. 1 and (iii) actual disbursements in attending court or (b) proceeded to tax Item 154 on party and party basis.

[4] However, on an application for review of taxation the Judge may exercise such powers and discretion as vested in the Registrar in relation to the subject matter of the application (O. 59 r. 36(4)) and may make such order as the circumstances require, and in particular order

the Registrar's certificate to be amended (O. 59 r. 3(5)). The Court accordingly directed counsel for the 1st respondent to file an amendment to Item 154 and directed the Ag. Deputy Registrar to deal with it having regard to the guideline laid down therein.

Cases referred to:
Gundry v. Sainbury [1910] 1 KB 645
Goodwin v. Storrer [1947] 1 KB
Pecheries Ostendaises v. Merchants Marine Insurance Co. [1928] 1 KB 750

Legislation referred to:
Rules of the High Court 1980, O. 59 rr. 27(2), (29), 36, (4), (5)
Rules of the High Court [Borneo] 1963, O. 65 r. 27(29)

For the 1st respondent/applicant - C.K. Goh standing in for Chew Pok Oi
For the petitioner/respondent - M.S. Sandhu

JUDGMENT

George Seah J:

This is an application by the 1st respondent, Celestine Ujang anak Jilan under O. 59 r. 36 of the Rules of the High Court 1980 to review the taxation of a bill of costs dated 4 June 1981. The application is concerned solely with the sum of RM17,886 in out-of-pocket column under Item 154 being Skrine & Co.'s bill of charges which was wholly disallowed by the Ag. Deputy Registrar, who was the taxation master.

Mr. Chew Pok Oi appears for the 1st respondent and Mr. Sandhu represents the petitioner, Hu Liong Kong.

It is common ground that the petitioner, the 1st respondent and one Mohamad bin Nawi submitted their nomination papers as candidates for the state constituency N. 42 Kemena in the state election held in 1979. The returning officer rejected the nomination paper of the petitioner and after polling, the 1st respondent was declared duly elected. In due course, the petitioner filed an election petition to declare the election of the 1st respondent null and void. On 3 October 1980 the Election Petition was struck out and dismissed on technical ground by the election Judge who also ordered the petitioner to pay the said respondents the costs of the action to be taxed. The election Judge also granted a certificate for 2 counsel for the 1st respondent.

On 12 November 1979 the 1st respondent appointed Matthew Chan Theng Kiang Esq., of Messrs. Chan, Jugah, Wan Ullok & Co., as his advocate in this proceeding. And on 28 January 1980 Peter Mooney Esq., of Skrine & Co., advocates & solicitors, Kuala Lumpur, Peninsular Malaysia, was appointed by the 1st respondent as his leading counsel. Since the legal profession in Malaysia is a fused one in the sense that an advocate can act both as a barrister and/or solicitor, it is conceded by Mr. Chew that although Mr. Peter Mooney was briefed as leading counsel the position of Mr. Matthew Chan was that of a junior as well as the instructing solicitor. Notwithstanding a certificate for 2 Counsel Mr. Chew also concedes that the 1st respondent would only be entitled to one set of "getting-up fee, his bill of costs, and the Ag. Deputy Registrar allowed the sum of RM4,500 under this head (see Item 118). There was no application by either party to review this item before me.

When a Judge which expression also includes an Election Judge, makes an order that the costs of the action to be taxed and in the absence of anything to the contrary, it is assumed that the costs are to be taxed on party and party basis. Now, what are party and party costs? Cozens-Hardy MR in *Gundry v. Sainbury* [1910] 1 KB 645 said at p. 649:

> They are not a complete indemnity, but they are only given in the character of an indemnity. I cannot do better than read the opinion expressed by Bramwell B in *Harold v. Smith* 5 H & N at p. 385: `Costs as between party and party are given by the law as an indemnity to the person entitled to them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained.'...

In *Goodwin v. Storrer* [1947] 1 KB at p. 458 Denning J (as he then was) observes that "taxation as between party and party" is an inquiry as to the costs which a party should recover from the opposite side.

Counsel for the 1st respondent has rightly drawn my attention to O. 59 r. 27(2) which provides that on a taxation on party and party basis there shall be allowed all such costs **as** were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. Now, contrast O. 65 r. 27 (29) of the rules of the High court in Borneo 1963 which reads:

> On every taxation the Registrar shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for the defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the Registrar to have been incurred or increased through overcaution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses.

O. 65 r. 27(29) had been the subject of interpretation by the Court of Appeal in the case of *Pecheries Ostendaises v. Merchants Marine Insurance Co.* [1928] 1 KB 750 and at p. 756 Lord Hanworth MR said:

> With regard to costs generally, it must be borne in mind that Order LXV r, 27, sub-r. 29 allows a very wide discretion to the Taxing Master, and I do not desire to say anything to circumscribe that discretion in any way. The rule has been drawn in wide terms in order to give a wide latitude to the Taxing master's discretion....

At p. 762 Atkin LJ said:

> ....it appears to me to be very important to bear in mind that the Taxing Masters have got to apply the words of O. LXV r. 27 sub-r. 29. That rule is the guiding rule in the taxation of costs. It is intended to sum up generally the principles upon which costs are awarded; and I cannot help thinking that if that rule were really rigorously applied by everybody - and by 'rigorously applied' I mean applied in all cases and giving full effect to the width of its language - there would be many fewer complaints by successful litigants than there are at the present moment. It is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. It says in terms that the Taxing Master is to allow `all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice'. That is the whole principle that the Taxing master has got to apply.

Now, Order LXV r. 27 sub-r. 29 is in *pari materia* with O. 65 r. 27(29) of the Rule of the High Court in Borneo 1963. But it is pertinent to observe that O. 59 r. 27(2) is quite differently worded from O. 65 r. 27(29) in that instead of "as shall appear to him to have been necessary or proper" the relevant wordings in the new sub-rule read "as were necessary or proper". In my opinion, whereas under the old sub-rule, very wide discretion was given to the Registrar in taxing a bill of costs, his discretion has been cut down considerably. Under the new rule, it is my view that the Registrar will only allow an item of costs if he is satisfied that such costs were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.

Applying this to the facts of this election petition, the Ag. Deputy Registrar should have no difficulty in coming to the conclusion that it was necessary and proper for the 1st respondent to brief leading counsel in the person of Mr. Peter Mooney of Skrine & Co., advocates & solicitors, Kuala Lumpur, Peninsular Malaysia in defending this proceeding brought by the petitioner inasmuch as the election Judge had granted a certificate for 2 counsels when he dismissed the said petition and ordered the petitioner to pay to the 1st respondent the costs of the action to be taxed.

Now, a brief is counsel's instruction to appear at a hearing. It contains all the information and papers necessary for counsel to conduct the case, including proofs of the witnesses' statements. The papers in a brief remain the property of the client. As to the preparation and contents of a brief see 36 Court Forms (2nd ed.) 125.

When leading counsel is briefed it is customary to pay a brief fee and an undertaking to pay refresher fees to be mutually agreed. In the context of the fused profession which prevails in Malaysia it is my view that instead of a refresher fee payable after 5 hours in court on the first day, the fee of leading counsel should be taxed on the basis contained in Item 32(a)(i) and (b)(i) of the scale of costs part 1 of O. 59 App. 1 of the Rules of the High Court 1980. If the leading counsel comes from outside Sarawak, in addition to the prescribed fees, he may be entitled to claim for air-passages and hotel charges in connection with court hearing.

In disallowing the whole of Item 154 the Ag. Deputy Registrar held that since the order for costs was on a party to party basis, the claim of RM17,886 by the 1st respondent should be rejected in toto.

There can be no doubt whatsoever that the bill of professional charges of Skrine & Co., advocates & solicitors, Kuala Lumpur, Peninsular Malaysia for the sum of RM16,750 as professional services and RM1,136 for disbursements making a grand total of RM17,886 is a bill based on taxation as between solicitor and own client. In other words, this bill contains the costs which a client ought properly to pay to his own solicitor; it is not a bill of costs which the 1st respondent should recover from the petitioner. Since the 1st respondent's bill of costs is to be taxed on party and party basis under O. 59 r. 27(29) thereof and not as between solicitor and client, the Ag. Deputy Registrar was quite right to disallow the RM17,886 claimed by the 1st respondent, vide Skrine & Co's bill of professional charges (see CPO 2). With respect, that, however, is not the end of the matter. As the election Judge had granted a certificate for 2 counsels to the 1st respondent and in view of my ruling that the costs of leading counsel in the person of Mr. Peter Mooney of Skrine & Co., advocates & solicitors, Kuala Lumpur, Peninsular Malaysia were necessary and proper for the attainment of justice or for defending the rights of the 1st respondent in this proceeding the Ag. Deputy Registrar, in my opinion, should either (a) direct counsel for the 1st respondent to amend Item 154 by including (i) brief fee of leading counsel, (ii) his costs under item 32(b)(i) of the scale of costs, appen. I and (iii) actual disbursements in attending court, or (b) proceed to tax item 154 on party and party basis having regard to the three factors which I have enumerated above, bearing in mind that items (i) and (ii) should come under costs column and item (iii) under out of pocket column. By rejecting the whole of Item 154 the Ag. Deputy Registrar had wrongly deprived the 1st respondent of claiming the costs of his leading counsel on party and party basis, costs which the 1st respondent was entitled to claim from the petitioner by virtue of the court order dated 3 October 1980.

a On the hearing of an application for review of taxation the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject matter of the application (O. 59 r. 36(4)). Sub-rule 5 provides that the Judge may make such order as the circumstances require, and in particular, may order the Registrar's certificate to be amended, or except where the dispute as to the item under review is as to amount only, order the item to be remitted to the Registrar for taxation.

b Under the circumstances of this case, I direct counsel for the 1st respondent to file an amendment to item 154 in the light of this ruling within thirty days from date hereof relating to the costs of Mr. Peter Mooney, as leading counsel in this proceeding. After the amendment has been delivered I direct the Ag. Deputy Registrar to deal with it having regard to the guideline laid down herein.

c I award to the 1st respondent the costs of these proceedings in chambers which I will fix at RM64.

Also found at [1982] CLJ 376

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